IN THE
SUPREME COURT OF THE UNITED STATES

No. 86-1112

LOUIS AND JACQUELINE TUCKER, H/W AND CHRISTINA TUCKER, by her parents and guardians LOUIS AND JACQUELINE H. TUCKER
Petitioners

v.

THE AMBASSADOR BEACH HOTEL, THE HOTEL CORPORATION OF THE BAHAMAS, WHITAKER TRAVEL, LTD., APPLE TOURS AND HAPPY TRAILS STABLES
Respondents

BRIEF FOR RESPONDENTS THE HOTEL CORPORATION OF THE BAHAMAS TRADING AS THE AMBASSADOR BEACH HOTEL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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EDITOR'S NOTE

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This Brief is filed on behalf of respondent The Hotel Corporation of the Bahamas, trading as The Ambassador Beach Hotel.

I. OPINIONS BELOW

The reported opinions below are provided in the Appendix to Petition for Writ of Certiorari.

II. JURISDICTION

As set forth in the Petition for Writ of Certiorari, jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

III. STATUTES INVOLVED

The statute involved in the Petition for Writ of Certiorari is the Foreign Sovereign Immunities Act, 28 U.S.C. §1601 et seq. Section §1605 of the Act provides, in pertinent part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -

* * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

IV. COUNTERSTATEMENT OF THE CASE

Many of petitioners' factual averments in the Statement of the Case are unsupported by the record and represent disputed, unverified embellishments of the bare pleadings under review. For example, petitioners contend that the accident was a direct result of the Hotel's commercial joint venture with Apple Tours. There is no evidence of any "joint venture" on the record. Nor is there any allegation or proof that respondent Hotel Corporation "lured the Tucker women to its facility in the Bahamas by conducting extensive commercial activity in the United States" (Petition p. 18)

More importantly, neither the Complaint nor the Amended Complaint allege a cause of action based upon negligent misrepresentation or false advertising. The only negligence alleged relates to the horseback riding stables operated by Happy Trails Stables in the Island of the Bahamas.

Essentially, this case is a personal injury action for damages sustained by petitioners in a horseback riding accident which occurred on December 4, 1982 near the Happy Trails Stables facility in the Bahamas while the petitioners were riding on Happy Trails horses which they had hired for the afternoon. Happy Trails Stables is a private commercial enterprise.

Respondent, The Hotel Corporation of the Bahamas, is a governmental subsidiary which owns the Ambassador Beach Hotel. Petitioners were staying at the Ambassador Beach Hotel on their Bahamian vacation. **Respondent's only connection with petitioners' accident is the fact that they permitted Happy Trails Stables to display its brochures in the lobby of the Hotel.**

More specific clarifications of the record will be addressed in the respondents' brief on the merits if the Court grants this appeal but will not be stated here because even if the facts argued by

petitioners were part of the record, those facts would not be sufficient to allow the Pennsylvania courts to assume jurisdiction over the foreign entity respondent or change the correctness of the legal opinions rendered in this case.

V. REASONS FOR DENYING THE WRIT

Rule 17 of this court provides:

> "A review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor."

The Rule goes on to describe "the character of the reasons" the Court will consider in passing on a petition for certiorari, such as: (1) conflicts in decisions between federal courts of appeal on the same issue; (2) wide departures by a federal court of appeals from the "accepted and usual course of judicial proceedings," and (3) a decision by the federal court of appeals on an important question of federal law which has not been, but should be, settled by this Court," or which "has decided a federal question in a way in conflict with applicable decisions of this Court."

When measured by the foregoing standards, the defects of the present Petition are both clear and fatal.

Simply stated, there are no special or important reasons why this Court should review the Pennsylvania trial court's dismissal of petitioners' personal injury action because that order and the appellate courts' affirmances thereof are in accord with all comparable federal and state decisions involving the interpretation and application of section 1605(a)(2) of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1605(a)(2).

The Pennsylvania courts interpreted FSIA properly when they concluded that the pivotal inquiry in determining whether or not the foreign entity is immune from suit in the United States is not whether the entity, here The Hotel Corporation of the Bahamas t/a The Ambassador Beach Hotel, engaged in <u>any</u> commercial activity in the United States but rather whether the cause of action <u>sub judice</u> is based on: 1)

reason for this Court's review; for the most part, petitioners dispute the courts' factual determination that the activity which relates to the cause of action was not carried on in the United States. Those factual and legal arguments have been reviewed by two trial courts and three appellate court panels on both the state and federal level without any variance in result[1].

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1 This petition arises out of two actions filed in the Court of Common Pleas of Philadelphia, Pennsylvania, No. 4638, July Term, 1983 and No. 4665, October Term, 1983, which suits are identical in substance but the latter action specifically names The Hotel Corporation of the Bahamas as a defendant. The original suit only identified The Ambassador Beach Hotel as a defendant, but was amended, without leave of court or agreement of the parties, to name The Hotel Corporation of the Bahamas. Plaintiffs have continued to litigate both actions notwithstanding their duplication. Thus, the trial court considered Preliminary Objections raising the FSIA jurisdictional immunity issue in both cases and entered orders in both on March 2, 1984 and May 22, 1984, respectively. Plaintiffs asked for reconsideration of both orders, which requests were denied by Honorable Alfred DiBona, Jr. on March 17, 1983 and June 12, 1984, respectively. All four orders were

Moreover, petitioners are presently litigating the merits of the personal injury case in the appropriate jurisdiction, i.e., the Commonwealth of the Bahamas. Thus, any remand or reopening of the underlying suit now would only result in multiple prosecution of the same action.

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1 (cont.)

independently appealed to the Pennsylvania Superior Court at Nos. 0977, 1055, 1056 and 1109, Philadelphia 1984.

After the dismissal of the Complaints, plaintiffs attempted to supplement the record with various extraneous matters concerning advertisements by entities other than the named defendant (e.g., advertisements by the Bahamian Ministry of Tourism -- a separate corporate entity) and activities by the Hotel Corporation in the United States that are entirely unrelated to the alleged tortious conduct involved in this action, by petitioning both the lower and appellate courts. In response, the Superior Court, by order dated December 20, 1984, remanded appeal Nos. 977, 1055, 1056, 1109 and 1792 ("Appeal I") to the trial court for the purpose of determining whether certain specifically identified documents should be made part of the record on appeal. Judge DiBona heard argument and reviewed briefs and ruled on February 6, 1985 that the evidence should not be included because it was irrelevant. Judge DiBona also entered a protective order

A. The Exception to Sovereign Immunity Set Forth in Clause 1 of Section 1605(a)(2) Is Not Satisfied by the "Minimum Contacts" Standard.

Federal and state courts have consistently held that the plain language of Clause 1 of §1605(a)(2) requires more than the "minimum contacts" long-arm jurisdiction standard; section 1605(a)(2) requires

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1 (cont.)

terminating any further discovery because plaintiff was still serving discovery requests notwithstanding the appeals and Pa. R.C.P. 1701(b). Those orders were appealed at Nos. 605 and 606 Philadelphia 1985 ("Appeal II").

On October 18, 1985, the Superior Court affirmed the lower court decisions in Appeal I. A Motion for Rehearing En Banc was denied on December 26, 1985. In a Memorandum Opinion dated December 30, 1985, the Superior Court also affirmed the lower court orders in Appeal II. Petitions for Allowance of Appeal with the Pennsylvania Supreme Court were filed at Nos. 61 and 79 E.D. Allocatur Docket 1986 relating to Appeals I and II, respectively. The Pennsylvania Supreme Court denied allocatur on October 2, 1986.

In parallel proceedings, petitioners filed identical federal court suits identical in form to the state complaints against the Commonwealth of the Bahamas and the Ministry of Tourism (Civil Nos. 84-5123, 85-1685, E.D. Pa.) which were

a nexus between the alleged commercial activity in the United States and the acts upon which the suit is filed. Vencedora Oceania Navigacion v. Compagnie Nation, 730 F.2d 195 (5th Cir. 1984); Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982); Velidor v. UPG Benghazi; 653 F.2d 813 (3d Cir. 1981); Sugarman v. Aeromexico, 626 F.2d 270 (3d Cir. 1980).

Petitioners argue that the Pennsylvania courts have jurisdiction over respondents because the Hotel Corporation conducts some minimum commercial activity in the United States, i.e.; the maintenance of a mailing address in Coral Gables, Florida; the institution of an entirely unrelated collection action in the Court of Common Pleas of Philadelphia, Pennsylvania, and the lease of Pitney-

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1 (cont.)

also dismissed on the ground of sovereign immunity. The Third Circuit affirmed the dismissals on June 9, 1986 (No. 85-1709/1710 Third Circuit) (Opinion dsprinted as Appendix L to Petition).

Bowes postage machines. The fallacy of petitioners' argument is that these activities bear no nexus to the negligence alleged here.

In an attempt to cure this jurisdictional deficiency, petitioners argued in the appellate courts (notwithstanding the lack of factual averments in the pleadings to support the argument) that the advertising and promotional efforts of the Bahamian Government, through its Ministry of Tourism, a separate corporate entity, constitute tortious overpromotion and fraudulent misrepresentation[2]. Similar claims have been rejected consistently by the Courts. Tigchon v. Island of Jamaica, 591 F.Supp. 765 (W.D. Mich. 1984); Harris v. VAO Intourist Moscow, 481 F.Supp. 1056 (E.D.N.Y. 1979), aff'd. mem., 607 F.2d

2 This argument was also raised in petitioners' suit in federal court against the Bahamian Government and soundly rejected by the district court and third circuit. Tucker v. Whitaker Travel, Ltd., 620 F.Supp. 578, 584-85 (E.D. Pa. 1985) aff'd. unpublished opinion (reprinted as Appendix L to Petitioners' Petition).

Tigchon v. Island of Jamaica, supra, a wrongful death action arising out of a water-skiing accident at the Negril Beach Village, a resort hotel owned and operated by the foreign entity, is an analogous case. There, plaintiff argued that the defendant distributed travel literature at a Grand Rapids travel agency; that Negril Beach advertises in the United States, and that they maintained an authorized representative in the United States. The Court nonetheless dismissed the Complaint with the following explanation:

> In this case, the connections between defendant, plaintiff's injury, and the United States are even more remote than those in Harris and In re Air Disaster. Jamaica has expressly denied that Sunflight Tours is its agent or authorized representative. The travel brochure perused by plaintiff and her husband was published by the independent tour operator, Sunflight, and was not part of a systematic direct publicity campaign organized by Jamaica and conducted by Jamaica in the United States. Plaintiff apparently concedes that the distribution of promotional literature by an independent tour operator is a very slender reed upon which to found jurisdiction. Plaintiff states, at p. 9 of her brief,

> Regardless of whether Jamaica itself was doing the advertising or causing third parties to do so on its behalf, the advertising was intended to create 'substantial contacts' with the United States...

This statement inaccurately states the test for jurisdiction under section 1605. First, independent commercial activity of a third party is insufficient to establish jurisdiction. Yessenin-Volpin v. Novosit Press Agency, 443 F.Supp. 849 (S.D.N.Y. 1978). Second, in the regardless of "intended contacts, the foreign state is entitled to immunity and there is no jurisdiction.

Moreover, it cannot be said that plaintiff's cause of action is "based upon substantial contacts with the United States." The death of plaintiff's decedent is allegedly due to the negligent conduct of an employee of the Negril Beach Village accompanying plaintiff's decedent while water-skiing. Harris is directly on point, holding that the nexus between the plaintiff's death in a Moscow hotel, and the activities of the tour operator that arranged the visit were too attentuated to satisfy section 1605's requirements that the action be "based upon" contacts with this country. The Act clearly contemplates a direct connection between the injury suffered and the contacts with the United States. No such direct nexus exists between a one-line advertisement in a world-wide listing of hotels, an advertisement published by an independent tour operator, and the tragic death of Mr. Tigchon while water-skiing. Any links are simply too attenuated and indirect to satisfy the first clause of section 1605.

Id., at 767-8.

Likewise, in Harris v. VAO Intourist Moscow, supra, the Court expressly found that jurisdiction under Clause 1 of §1605(a)(2) must be keyed to activity in this country which is related or "linked" to the claim for relief. Based on this analysis of FSIA, the Court opined:

> The first clause of section 1605(a)(2) focuses upon actions arising from commercial activity within the United States. This is essentially a clause which deals with the transaction of individual business deals in the United States. It is not equivalent to the 'doing business' provisions described in II B., supra. The clause requires that the court action 'be based upon' the specific commercial activity carried on in the United States. It resembles the 'transaction' of business clauses used in many of the long arm provisions. See, e.g., Uniform Interstate and International Procedure Act §1.03(1), 9B Uniform Laws Annot. 310 (1966). The commercial activity out of which plaintiff's claim arises is the operation of the Hotel in Moscow; despite the apparent integration of the Soviet tourist industry, the relationship between the negligent operation of the National Hotel and any activity in the United States is so attenuated that this clause is not applicable. Even though defendants may be doing business here in the traditional sense, Frummer v. Hilton Hotels International, Inc., 19 N.Y. 2d 533, 536, 281 N.Y.S.2d 41, 43, 227 N.E.2d 851 (1967) (emphasis in original), cert.

> denied, 389 U.S. 923, 88 S.Ct. 241, 19 L.Ed.2d 266 (1967), there is no 'doing business' provision in the Act. This civil court action is not based upon commercial activity in the United States.

Id., at 1061.

Accordingly, the Harris court determined that Clause 1 of §1605(a)(1) did not apply.

In Vencedora Oceanica Navigacion v. Compagnie Nation, 730 F.2d 195, 202 (5th Cir. 1984), the Court, examining Clause 1 noted:

> We regard a nexus approach simply as a more effective means of carrying out the goal of requiring a connection between the lawsuit and the United States that the language of clause one appears to embody. A "doing business" test, on the other hand, focuses on the connection between the defendant and the United States; by definition it requires no specific connection between the lawsuit and the United States. Since, as the dissent notes, a "doing business" test is more controversial internationally than a nexus test, we think it likely that Congress specifically intended not to include "doing business" as one of the commercial activity exceptions, and did so in part through its restrictive wording of clause one. We note further that section 1605(a)(3), the expropriation exception, clearly embodies a "doing business" test, helps persuade us that Congress did not clearly include a "doing business" test among the commercial activity exceptions on purpose.

There is absolutely no evidence of record, or in the extra-record materials submitted by petitioners, that the Ambassador Beach Hotel or the Hotel Corporation of the Bahamas ever advertised, promoted, solicited business for or was in any way related to or affiliated with the Happy Trails horseback riding stable. The only evidence is that the Bahamian Tourist Office, an entirely separate entity, lists horseback riding as an activity available to vacationers on the islands. To entertain the notion that those descriptions by the Bahamian Tourist Office of sports facilities available on the islands could or should support jurisdiction over the respondents under one of the exceptions to FSIA because those materials were distributed in the United States is contrary to the language and spirit of the FSIA.

B. The Pennsylvania Courts Interpreted and Applied The "Direct Effects" Requirement of Clause 3 of §1605(a)(2) Properly.

The Pennsylvania courts' conclusion that the residual effects of the injuries petitioners sustained in the Bahamas do not constitute "direct effects" in the United States as that term is used in Clause 3 of §1605(a)(2), is consistent with every other court that has considered the issue. Yugoexport, Inc. v. Thai Airways Int'l., Ltd., 749 F.2d 1373, 1375 (9th Cir. 1984) cert. denied, ____ U.S. ____, 105 S.Ct. 2326 (1985); Australian Government Aircraft Factories v. Lynne, 743 F.2d 672 (9th Cir. 1984); Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir. 1984) cert. denied, ____ U.S. _____, 105 S.Ct. 510 (1985); Zernicek v. Petroleos Mexicanos (Pemex), 614 F.Supp. 407, 413 (S.D. Tex. 1985); Keller v. Transportes Aereos Militares Ecuadorianos, 601 F.Supp. 787, 790 (D.D.C. 1985); Close v. American Airlines, 587 F.Supp. 1062

(S.D.N.Y. 1984); Dorrian v. Lucayan Bay Hotel, No. 80-1740 (E.D. Pa. Dec. 2, 1980) (unreported); Harris v. VAO Intourist Moscow, supra; Upton v. Empire of Iran, 459 F.Supp. 264 (D.D.C. 1978).

In Australian Government Aircraft Factories v. Lynne, supra, the Ninth Circuit reversed the District Court's finding that the death of a pilot and the damage to the plane overseas caused "direct effects" to the pilot's survivors and the California corporation which owned the plane. In Keller v. Transportes Aereos Miltares Ecuadorianos, supra, another wrongful death action, the Court arrived at the same conclusion.

In Berkovitz v. Islamic Republic of Iran, supra, the murder of an American citizen in Iran was held to have no "direct effect" in the United States upon which to predicate jurisdiction under Clause 3 of §1605(a)(2).

In Zernicek v. Petroleos Mexicanos (Pemex), supra, the District Court concluded that plaintiff's argument that the effects of radiation exposure did not manifest for a long period of time and, accordingly, the injurious effect occurred in the United States did not distinguish "the overwhelming weight of case authority" that it was not a "direct effect" in the United States.

Close v. American Airlines, supra, involved a personal injury action for injuries sustained when plaintiff was struck by the jet-wash of a nearby airplane as she was disembarking from her flight at the Kingston, Jamaica airport. The court dismissed the action, finding that personal injury elsewhere does not qualify as a "direct effect" in the United States to permit jurisdiction under Section 3.

In Dorrian, supra, the District court held that the injuries the plaintiff sustained in the Bahamas did not

constitute a direct effect in the United States "despite the fact that the injury which was suffered abroad continues to cause suffering and economic loss to plaintiff in the United States".

As stated above, the Harris case involved a death action brought on behalf of an American tourist who was killed in a fire in the National Hotel of Moscow. The Harris court also concluded that "indirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the direct effect requirement of §1605(a)(2)." Harris, 481 F.Supp. at 1062.

In Upton v. VAO Intourist Moscow, supra, an American citizen was injured when part of the ceiling in the Teheran Airport collapsed. The court dismissed the plaintiffs' action for lack of jurisdiction pursuant to FSIA because of the lack of direct injury in the United States.

Petitioners fail to cite any case which concludes otherwise. They argue instead that courts involving cases of injury to corporate concerns are more liberal in the "direct effects" standard than they are to personal injury actions of individuals. The authority cited for this conclusion, Texas Trading and Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), carefully reviewed, does not support such a conclusion. The monetary loss in Texas Trading was a direct, not a residual, effect. The inequity perceived by petitioners is not substantiated.

CONCLUSION

Petitioners' suggested interpretation of the Foreign Sovereign Immunities Act would permit any American citizen, injured anywhere in the world, as a result of negligence of a purely private business entity (such as a horseback riding stable) to sue the foreign government

because that government lured the American to the foreign land without expressly warning the citizen that there may be dangers lurking in the land. When it passed the Foreign Sovereign Immunities Act, Congress, as the Courts have consistently and correctly concluded, did not intend to open the door so broadly. Such an interpretation would emasculate the concept of sovereign immunity embodied in the Foreign Sovereign Immunities Act.

Respectfully submitted,

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